Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES		
AGAINST		No. 117.
SALAMBIER.		

BRIEF FOR APPELLEE.

Statement.

June 23, 1891, M. Salambier imported into New-York some small tablets made out of cocoa sweetened with sugar, *known commercially as 'sweetened chocolate.'* (Record, p, 1, folio 2.)

The then-existing tariff of 1890, contained three paragraphs to which the attention of the Court is invited, viz.;

Par. "318. Chocolate (other than chocolate confectionery and chocolate commercially known as sweetened chocolate) two cents a pound." (26 Stats. 588.)

[NOTE—*That Congress intended the parenthesis to end with 'confectionery' will be hereinafter mentioned.*]

Par. "319. Cocoa, prepared or manufactured, not specially provided for in this act, two cents per pound." *(Ibid.)*

MEMO. *These two are the only clauses of the act affixing this, two-cent, rate to cocoa, or chocolate, in any form, by itself or mixed.*

Par. " 239. All other confectionery, including chocolate confectionery, not specially provided for in this act, fifty per centum *ad valorem*." (26 Stats. 584, bottom.)

The collector levied duty (50%) upon these importations under this last-quoted paragraph (239); against which exaction the importer duly filed this protest, omitting date, address and signature—which were all correct;—

" I do hereby protest against the rate of 50% assessed on chocolate imported by me, Str. La Bretagne, June 23/91.

" Import entry 96656.—M. S. No. 52/53.

" I, claiming that the said goods under existing laws are dutiable at 2 cents per lb., and the exaction at a higher rate is unjust and illegal, I pay the duty demanded to obtain possession of the goods, and claim to have the amt. unjustly exacted refunded." (Rec. 1, fol. 2.)

The Board of General Appraisers reversed the collector's decision, and held " that the said merchandise was dutiable at two cents per pound under paragraph 319 [*sup.*] of the tariff act of Oct. 1, 1890, and that the importer should not be deprived of his remedy by reason of having failed to specifically claim classification of the said imported merchandise as a manufacture of cocoa under said paragraph 319." (Rec. 1, 2, fols. 2, 3, §3.)

The government took an appeal, alleging the insufficiency of the protest. The Circuit Court sustained the protest, and the Board's action thereon. (*Id.* 2 §§ 4, 5, 6.)

Upon further appeal taken to the U. S. Circuit Court of Appeals, this latter Court certifies to the Supreme Court this question, viz.;—

" Was the protest hereinabove set forth a good and sufficient protest under existing law against the decision of the collector in his assessment of duty upon the appellee's importation of *sweetened chocolate*, under the tariff act of October 1, 1890?" (Rec. 2, fol. 4; § 7.)

POINTS.

I.

Res adjudicata.

By *res adjudicata*, we do not mean that the facts as between the present parties, have been adjudicated; nor that there can be any estoppel against the United States; but only to indicate that, in a case where the controlling fact was substantially the same as here, the question of *law* here certified has been decided in favor of the importer and conformably to the present contention of the appellees.

Heinze v. Arthur, 144 U. S. 28.
Frazee v. Moffitt, 20 Blatch. 267.

If permitted, we will hand up ten copies of the bill of exceptions in the Heinze case, to obviate reference to the transcript of it in the Clerk's office; these ten being all left to us of those printed for use in the Court below.

It will be seen that the motion for a directed verdict for defendant, in Heinze case, was made and granted upon the ground of the omission to state in the protest that the goods were made on frames;—

"and that, while these were in force, at the time the protest was served, *many* provisions of law . . . providing for a duty of 35% which might be applicable to plaintiffs' goods, *there was nothing in the protest to show which one of them was relied upon by the importer.*"

For error in granting such motion, the judgment rendered below, upon such directed verdict, was reversed. (144 U. S. 28.)

In the opinion, per BLATCHFORD, it was observed;—

"The protest further claimed that the gloves were liable to a duty of only 35%, less10 %;—and [they] were, in fact *only liable to that duty*, whether liable to 30% under § 22 of the act of March 2, 1861 (12 Stats. 191) with the 5% added under § 13 of the act of

July 14, 1862 (*Id.* 555–7) or at 35% under the act of June 30, 1864 (13 *Id.* 208–9) with the reductions, as to all those provisions, under the act of June 6, 1872." (17 *Id.* 231.) Heinze v. Arthur, 144 U. S. 33, bottom.

Schell v. Fauché, 138 U. S. 568–9.

The 'they' interpolated in the second line of the foregoing quotation must be understood; and that word might properly have commenced a new sentence, omitting the 'and'; since, it must be remembered, *the protest* (found at bottom of page 29 and top of page 30 of the printed transcript of that case, No. 146, Oct. Tr. 1891,—copy herewith tendered) *contained no reference to either of the enactments* mentioned in the Opinion, *nor to any other*.

This omission was the ground of the Circuit Court's direction, in that case to find a verdict for the defendant.

In so directing, Judge LACOMBE only followed earlier rulings in that same Court; (24 F. R. 852, see 116 U. S., 375; 27 F. R. 651; 47 *Id.* 873; 49 *Id.* 224 *et als.*); but it was this tendency which the Supreme Court corrected in the Heinze case. The present effort of the government is to have this Court now sanction an unjust technicality, which it has heretofore condemned.

If (as in F. R. 873 and 49 *Id* 224) an importer told the collector his exaction was erroneous *because* another, specified, clause affixed the true rate, no recovery could be had if such specification were incorrect. In our brief in the Heinze case this distinction was carefully taken, and was subsequently declared in Herrman v. Robertson, 152 U. S., 526, bottom.

If the importer, however, merely states correctly the collector's error, adding naught to mislead him, this is sufficient. (144 U. S. 28.)

II.

Appellee's equity. Protest claims true rate.

That the collector imposed upon our goods a rate, and exacted from us a sum, not authorized by law is undisputed. The only controversy is whether the technical objection made by the District Attorney to our having back our own is tenable, and effective to bar our recovery.

The Board of General Appraisers found, (Dec. 10, 1892) "as matter of fact, that the merchandise in question consists of chocolate, in the form of small cakes or tablets, manufactured from cocoa, sweetened with sugar, but is not mixed with cream or fruits, or covered with sugar or other flavoring material. It is known commercially as sweetened chocolate" like that considered in the Board's decision of March 12, 1891. (Gen. Ap. Dec. 414; SS. 10,919.)

They add that it was assessed at 50% as chocolate confectionary, under par. 239, and is claimed to be dutiable at two cents a pound under existing laws.

The Board's Opinion concludes;—"The protestants having claimed that the merchandise was chocolate, or sweetened chocolate, and should be assessed at the rate at which it has been held to be dutiable by the Court, we are of the opinion they should not, under the circumstances, be deprived of their remedy by reason of having failed to *specifically* claim classification as a manufacture of cocoa, under Par. 319, and we accordingly sustain their claim," etc.

The Circuit Court's affirmance of the Board's action was accompanied by these observations, per

"WHEELER, J.—These goods were invoiced as 'Chocolate and Mfs. of Cocoa.' They were returned by the appraiser as 'Sweetened chocolate, as confectionery, 50%.' The importer protested 'against the rate of

50% assessed on chocolate, claiming that said goods under existing laws are dutiable at two cents per lb.' Chocolate was dutiable at two cents a pound. The General Appraisers assessed that rate. This appeal is taken for insufficiency of the protest. As the goods were chocolate, and the rate claimed in the protest was the rate on that, it seems to set forth 'distinctly and specifically' the reasons for the objection, to a sufficient intent. See Arthur v. Morgan, 112 U. S. 495."

The government's objection, as stated below with the emphasis of italics—so we suppose it likely to be the same here—was that "The protest is only against a rate of duty."

Perusal of the document shows this statement to be incorrect. After protesting against the illegal rate, the importer proceeds to claim and set forth the true rate—thus giving the Collector "a better writ"—and demands a refund of the *amount* unjustly exacted, as a consequence of adopting the wrong rate; to wit, the difference between 50% and two cents a pound. (Rec., p. 1, fol. 2.)

The applicable language of section 14 of the Administrative Act of June 10, 1890, reproduced from R. S., § 2931, is;—

"That the decision of the Collector *as to the rate and amount* of duties chargeable upon imported merchandise shall be final and conclusive, etc., unless the owner, etc., if dissatisfied with *such* decision [as to *rate* and amount] give notice in writing to the collector setting forth therein distinctly and specifically, and in respect to each entry, &c., the reasons for his objections THERETO"—i. e., to "the decision of the Collector as to the rate and amount."

The 'amount' is merely a mathematical application of the 'rate' to the ascertained value or quantity of the imports.

" "The importers were bound ONLY to state, *as* they they did, that the duty of 60% was illegal, and why *it* was illegal."

Heinze v. Arthur, 144 U. S. 34.
Houdlette, 48 F. R. 546.

In the present case, we had to state, as we did, why the fifty per cent exaction was illegal; to wit, because, the commodity being just what both parties knew it to be, two cents was the rate which chocolate (whether sweetened or not) should bear. It was not incumbent on us to state reasons why the article should pay two cents; "only" why it should *not* pay fifty per cent; although, the claim of that two-cent rate of itself indicated why the article should bear it, under one or the other of the only two, brief, consecutive paragraphs which affixed that rate to anything connected with chocolate.

Under which of these two paragraphs the demanded rate was to be applied was as immaterial in law as it would be to us in fact; as immaterial as it was whether the Heinze gloves were assessable under the act of March 2, 1861, etc., or under that of June 30, 1864, etc.

Heinze v. Arthur, 144 U. S. 33, bottom.

Perceiving the character of our goods, suppose the collector had assessed them at two cents a pound under par. 318: in that event, we should have had no more right in law than we should have had occasion in fact to protest because he had not applied that same rate under par. 319.

Rate (involving amount) is the all-important factor, which alone the law recognizes as issuable, in cases like the present, where the controversy is as to classification.

III.

Protest sustained by reason and precedent.

The error, corrected in the Heinze case, is in treating the protest as an isolated document; a narrative of all

the facts pertaining to the subject matter; instead of (as it is) one statutory step in a course of proceedings.

The course of proceedings, upon an importation, is well known to the Court, and given in detail in its opinion in Kimball v. Collector, 10 Wall. 436.

When entry is made, an invoice accompanies it, giving marks, numbers, value and contents of the entered packages. (1 McCulloch, Com. Dic. 207; Elmes, Customs, § 420). This is the document of vital importance in customs administration. (Gilp. 323, 17 How. *91; 3 Webst. Wks. 233.) Upon this the collector designates at least ten packages (or more, or all, if he likes) to go to the appraisers' stores for opening and examination. Though the appraiser conducts the examination, he does it under the direction and for the benefit of the Collector, to whom they report the facts ascertained by them. (10 Wall. 449, 450.) By General Treasury Regulations of 1884 (of which the Court takes judicial cognizance; 152 U. S. 212) in force at the date of our importations, Arts. 1408 and 1409 require the submission of samples with their report to the Collector, in all cases of doubt, together with the appraiser's opinion. Upon such information the Collector primarily bases his classification and his "decision" as to the rate and consequent amounts. If dissatisfied with that decision, *so reached*, the importer files with the Collector his protest against it;—not an essay, nor abstract discussion, nor directed against the reasoning, merely, of the customs officers, but to the conclusion arrived at by the Collector; briefly, but clearly, indicating the reasons of dissatisfaction with his "decision;" not with all his course of reasoning. It is a step in procedure. It calls a halt, and invites the collector himself, in the first place, to review what has been done theretofore. Naturally, this paper filed in compliance with statute, is supplemented by oral discussion, as this Court has noticed in treating of this subject. (18 How. 417 top.)

The reasons for being 'dissatisfied' are stated in writing; the argument in elaboration thereof is between man and man.

"The officers of the government on the one part, and the importer or his agent on the other, are brought into communication and intercourse *by the act of entry* of the import, and opportunities for explanation easily occur for every difference that may arise. We are not, *therefore*, disposed to exact any nice precision," etc.

Greeley v. Burgess, 18 How. 417 top.
Schell v. Fauché, 138 U. S. 568 top.
Maillard v. Lawrence, 3 Blatch. 381.
Vaccari v. Maxwell, *Ibid.* 374, where the Court notices that the protest is to be read in connection with the invoice and entry, etc.

Every writing is construed according to accompanying circumstances. This statutory notice is to be "in respect to each entry" (26 Stats. 137); connected with it. If the collector adheres to his decision, he is to forward to the Board of General Appraisers the invoice and all the papers and *exhibits* [samples] *connected therewith (Ibid.)*; these, taken altogether, constituting the case upon which he has made his decision, and upon which the Board is to act.

When we consider what the present case really was, the concluding sentences of the Chief-Justice's opinion, in Arthur vs. Dodge, are seen to be applicable:—"We have had no difficulty in reaching the conclusion that the protest in this case fully meets the requirements of this rule. No one could have any doubt of the nature and character of the claim that was made." 101 U. S. 37.

Let us consider:—

(1.) What was *the subject* of examination and decision by the collector:—

(2.) *His error*, as to that subject:—

(3.) Whether our protest sufficiently indicates *that* error.

(1.) The *subject* to which the collector's attention was invited, in the discharge of his official duty, was an importation of "sweetened chocolate, in the form of small cakes or tablets, sweetened with sugar, *known commercially as sweetened chocolate*." (Rec. 1, fols. 1, 2, § 1.)

They were entered as "Chocolate and Mfs. Cocoa." That the article was chocolate which had been 'sweetened with sugar' was apparent to the senses, and is not in dispute. *(Ibid.)*

The perceived presence of the sugar gave rise to the only controversy between the importer and collector; *as to the legal effect* of the known fact of it being sweetened. The question was that raised in Arthur v. Stephani:—"Was it dutiable as confectionery or as chocolate," or as a manufacture of cocoa? (96 U. S. 126.) In that case, the opinion shows a distinction made in every tariff, from 1792 down, between chocolate (sweetened or not) and confectionery. *(Ibid.* 127.) The several provisions of the act of 1890 (pars. 239, 318, 319) bearing upon the controversy—as to the proper legal conclusion from the admitted facts—are pertinent to be considered here; but they may be more satisfactorily discussed in a subsequent, separate division of this brief *(Post*, pp. 14 to 16), though here mentioned as pertaining to the subject of the collector's inquiry and decision. That subject will then be seen not to have been new to him, at the date of our importations. It had been acted upon by him, and his action had been the subject of diverse discussion: so he fully understood the issue—whether or not this sweetened chocolate should be dutied under par. 239—if not, it *must* be dutiable at two cents a pound under par. 318, or 319, no other clauses having any bearing upon chocolate.

(2.) The collector's error—now admitted to be one, since the only question is the sufficiency of the protest, no issue of fact arising upon the appeal—was in applying par. 239, act of 1890, to our goods, and assessing 50% duty upon them as confectionery;—or as "chocolate confectionery;"—which the Board of Appraisers and Circuit Court have found, upon the facts proven, they were not.

(3.) That error, of the character which it was, was indicated by our protest. The importer first protests against the 50% rate assessed upon his chocolate; and then tells the collector that the claim is that, under existing law, two cents a pound is the rate at which the goods are dutiable, and the exaction of any higher rate is unjust and illegal. (Rec. 1, fol. 2, § 2.)

The collector knew the imported article, and its constituents. He was bound to know the law; that two cents was the only rate the goods could bear, if his assessment were wrong; and that the two-cent duty must accrue under par. 318 or 319, it being utterly immaterial to everybody under which of them it was collected.

A similar protest was held good by Judge BLATCHFORD. Hay was assessed, under § 2516, at 20%, as a nonenumerated manufacture. The protest was against any greater or higher rate than ten percentum on the ground than no higher rate than 10% can be charged on hay imported. No section was mentioned; but Judge BLATCHFORD said the collector, with the law before him, could not fail to know that the claim was made under § 2516; though hay was not specified in that section. Neither did the protest state that the hay was dutiable as "unmanufactured," though that was the ground upon which Judge BLATCHFORD gave judgment for the importer. Frazee v. Moffitt, 20 Blatc. 269.

Sec. 2516 was no more in that collector's mind than pars. 318–9 *must* have been in mind when our protest was received.

So in an earlier case in the same court, where the protest was against the decision, claiming to recover the difference between the exaction and what ought to have been charged.

Maillard v. Lawrence, 3 *Id.* 378.

MEM: This is not the case reported in 16 Howard.

Lowenstein v. Maxwell, 2 Blatc. 403.

The decision (Arthur v. Morgan, 112 U. S. 495) cited by Judge WHEELER, seems conclusive of the present question, just as he considered it; especially when we perceive the status of the law and facts concerned in that decision.

June 30, 1876, the Attorney-General advised the Treasury Department that carriages were not "*household* effects" within the meaning of the free list (15 Atty.-Gen. Op. 125); and thereafter they were held liable to duty (112 U. S. 499 top). Undoubtedly, this opinion led Mrs. Morgan's agent to enter her carriage as '*personal* effects,' and to claim exemption under that designation, and as being such "in actual use." "Books, household effects," etc. are enumerated in the revision (second edition) at the top of page 484, followed by an alphabetical list of sundries, from 'Borate of Lime' to 'Wax,' covering five and a half pages, until, on page 489, we find "Wearing apparel, *in actual use*, and other *personal* effects." Her protest claimed exemption as "personal effects in actual use." (112 U. S. 496)

The court held that free entry, as a carriage used more than a year, under § 2505, was the thing claimed; that *household* effects must have been in the party's mind, as well as the collector's; and the latter "could not fail to understand" the protest, which was sufficient.

Arthur v. Morgan, 112 U. S. 501.
Schell v. Fauché, 138 *Id.* 568-9.

The collector classified our goods as 'confectionery.' He "could not fail to understand", not only

that we protested against this, but claimed the two-cent rate on account of the principal material, to which the sugar was accessary. His mind and the importer's *must* have been drawn to paragraphs 318 and 319, the only ones affixing to such material a two-cent rate;—much more certainly than in the Morgan case. The only objection made to our protest is that these numerals (or 319) were not inserted. Both might have been claimed, in alternative; but that would not really have enlightened the collector one particle as to the basis of our claim. It would have been useless verbiage. He understood perfectly wherein and whereby we were dissatisfied.

"A protest that indicates to an intelligent man the ground of the importer's objection *to the duty levied* upon the articles, should not be discarded because of the brevity with which the objection is stated". Schell v. Fauché, 138 U. S. 569.

The injustice of the government's contention can never receive any more forcible illustration than in this cause. The collector levies 50%. It is now conceded, our claim of two cents a pound stated the correct rate. The Board of Appraisers, solely engaged in applying eminent abilities to these questions, agree that this rate accrues under par. 318; the single judge of the Circuit Court thought this two-cent rate accrued under par. 319; the two judges holding the Circuit Court of Appeals, *agreeing upon this rate, disagree as to the paragraph* under which it accrues, Judge WALLACE agreeing with the Board that par. 318 applied, and Judge SHIPMAN sustained the Circuit-Court ruling, that par. 319 applied; though agreeing with Judge WALLACE and the Board that there was a clerical mistake, in including "sweetened chocolate" within the parenthesis of par. 318, yet considers the Court bound by the punctuation; so the Circuit Court judgment was affirmed by a divided appellate court; and, of the six gentlemen, learned in the law, who acted judicially

upon this question, circumstances led the opinion of two to prevail over that of the other four, and prevented the refund of a tax that all six agreed should not have been exacted. U. S. v. Schilling, 11 U. S. Ap. 603, 612. Yet it is now argued we must pay the rate everybody concedes to be wrong, against which we protested, because we did not either uselessly refer to both paragraphs, inserting a claim under each, or else hazard a guess between them, and fix upon par. 319.

Any such conclusion is a libel upon the name of *justice*.

IV.

Pars. 318 and 319.

Our protest was by no means the first to call the collector's attention to the subject of the proper classification of "sweetened chocolate." His assessment of prior importations had been reviewed by the Board and the courts and, unanimously, by these declared erroneous—and that two cents was the true rate of duty thereon.

Justice HUNT'S opinion, in Arthur v. Stephani, 96 U. S. 125, shown that from May 2, 1792, down Congress has discriminated between chocolate (though sweetened) and confectionery. The act of 1883 preserved this distinction, putting on "Chocolate, two cents a pound; cocoa, prepared or manufactured, two cents a pound" (22 Stats. 504); on sugar-candy, five cents; other confectionery, five cents; if worth over thirty cents, 50% *ad valorem*. (*Ibid.* 502.) It made no difference whether the chocolate, or cocoa, was sweetened or unsweetened. "Sweetened chocolate" is mentioned, for the first time in any tariff, in this par.

318 of the act of 1890; if not dutiable under that clause, it is nowhere specifically listed for duty, *eo nomine*.

Paragraph 318 *(ante*, p. 1*)* puts upon "chocolate" "(other than chocolate confectionery and chocolate commercially known as sweetened chocolate)" two cents a pound.

"Chocolate confectionery" by that act is dutiable at 50% *ad val.*, under par. 239, which the Collector applied to our goods. Austin, Nichols and Co. protested against such application to their similar importation, and (Mar. 12, 1891) the Board of Appraisers, in an opinion by Judge SOMERVILLE, sustained the protest, on the ground that the parenthesis should close with the word 'confectionery; and so correcting the punctuation, the goods in question were dutiable under par. 318, as claimed. (88. 10,919: G. A. 414.) This view was supported by the consideration that, otherwise, an enumerated article would be left without specification of duty, it not being named in the confectionery clause; and, it was stated, *arguendo*, in that case, that the bill as reported showed the punctuation as corrected; and that, subsequently to the enactment, a resolve making this correction passed the House, but did not get through the Senate.

Am. Net etc. Co. v. Worthington, 141 U. S. 473–4;
Jennison v. Kirk, 98 *Id.* 459, 460;
Blake v. Banks, 23 Wall. 31;
Collector v. Richards, *Ibid.* 258, bottom.

This action of the Board was reversed by the Circuit Court, which held the punctuation, as it is, must control; that the Austin goods were dutiable under par. 319; and as their protest claimed under par. 318 it must fail.

The same ruling was made in the later case of Schilling, to which we have just above referred.

Austin, 47 F. R. 873.
Schilling, 48 *Id.* 547.

As recited at the end of the next preceding division of this brief, by a divided court, only two judges sitting, the U. S. Circuit Court of Appeals affirmed the Schilling case, while stating the facts showing the placing of the parenthesis is, really, but a clerical error, defeating congressional intention.

U. S. v. Schilling, 11 U. S. Ap. 603, 612.
Cadenas (no op.) 8 C. C. A. 679.

In the Cadenas case, we were beaten because the protest claimed *only* under par. 318; the Court considering this to come within Herrman v. Robertson, 152 U. S. 521, and similar decisions; in the present case, the Circuit Court held in our favor, as within the rulings in the Heinze and Morgan cases. The Chief-Justice, in the Herrman case, observed that the protest did not "in *any way* suggest the provision which actually controlled," while it did suggest an entirely different contention. (152 U. S. 226 bottom.) In this case, much more plainly than in Morgan's, we did indicate the reasons for being dissatisfied with the collector's classification and assessment, and did "*suggest* the provision which actually controlled," though without indicating its numeration.

V.

Summary.

When our goods were imported and examined, their composition was apparent. The tongue recognized their sweetness. *De gustibus, non*, etc. Because of this attribute, the collector treated them as 'confectionery,' 50%. Our protest declared they were not 'confectionery'; and, therefore, were dutiable at only two cents a pound, demanding a refund of the differ-

ence. Our claim was right, our demand just, and should have been acquiesced in. The collector rejected them solely because we had not put in "par. 319." The Board and Circuit Court held this too technical; since the reasons of our position were sufficiently apparent to the collector, familiar with the subject and controversy.

The sole question now is, whether this, the only just, conclusion is not also the correct legal one.

VI.

The Question's Answer.

The submitted question should be answered affirmatively, and the decisions of the Board and of the Circuit Court sustained.

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